

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL F. LOWER,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

CASE NO. C06-0915MJP

ORDER REVERSING THE
COMMISSIONERS DECISION
AND REMANDING FOR AN
AWARD OF BENEFITS.

This matter comes before the Court on United States Magistrate Judge Benton's Report and Recommendation, (Dkt. No. 19) and Plaintiff Lower's objections to that Report and Recommendation. (Dkt. No. 20.) The Court, having reviewed the entire record, including the administrative record, the memoranda of the parties, the Report and Recommendation of Magistrate Judge Benton, Plaintiff Lower's objections, and the Defendant's response (Dkt. No. 21) ORDERS as follows:

- (1) The Court declines to adopt Magistrate Judge Benton's Report and Recommendation;
- (2) The Court REVERSES the Commissioner's final decision;
- (3) The Court REMANDS this case to the Commissioner to calculate an award of benefits.

BACKGROUND

Plaintiff Lower appeals to the Court from a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying his application for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act ("Act"). Magistrate Judge Benton issued a Report and Recommendation affirming the Administrative

1 Law Judge's ("ALJ") denial of SSI and DIB benefits. Plaintiff makes seven objections to Magistrate
2 Judge Benton's Report and Recommendation, and requests that the Court reverse the Commissioner
3 and either (1) find him disabled and remand for an award of benefits, or (2) remand for further
4 proceedings.

5 Lower is a fifty-three year old male with a Masters Degree in Theology. (Administrative
6 Record ("AR") at 46, 453.) His past work experience includes employment as a janitor, and a greeter
7 at Wal-Mart. (AR at 56.) Lower has been diagnosed with paranoid schizophrenia leading to two
8 breaks from reality requiring hospitalization in the mid 1980's. (AR at 155-157.) In 2001 and 2005 he
9 was also diagnosed with severe obstructive sleep apnea. (AR at 150, 206.)

10 On February 23, 2004, Lower filed an application for disability benefits. (AR at 43.) Lower
11 claims disability due to mental impairments including anxiety, depression, schizophrenia and obsessive
12 compulsive disorder, and physical impairments of sleep apnea and tremors. (AR at 23, 28, 55.) He
13 alleges an onset date of January 3, 2004. (AR at 43.) These claims were denied initially and on
14 reconsideration, and Lower timely requested a hearing. (AR at 23-26, 28-29, 30.) On September 9,
15 2005, Lower appeared and testified at the hearing before ALJ Verrell Dethloff. (AR at 450-464.) On
16 March 1, 2006, the ALJ issued an unfavorable decision, concluding that Lower could perform his past
17 relevant work as a janitor. (AR at 11-20.) Lower's appeal to the Appeals Council was denied, (AR at
18 6-10) making the ALJ's ruling the final decision of the Commissioner. 42 U.S.C. § 405(g). Lower
19 timely filed the present action challenging the Commissioner's decision. (Dkt. No. 3.)

20 **I. Commissioner's Decision**

21 At step one, the ALJ found that Lower had not engaged in substantial gainful activity since the
22 alleged onset date. (AR at 19.) At step two, the ALJ found Lower's functional psychotic disorders,
23 sleep apnea, and sleep-related breathing disorders to be "severe." Id. At step three, the ALJ found
24 Lower's disorders did not meet or medically equal one of the listed impairments. Id. The ALJ then
25 found Lower's allegation regarding his limitations to be "not totally credible," and determined that he
26 had the residual functional capacity ("RFC") for a "full range of physical work activity, with mental

1 impairments restricting him to more simple repetitive jobs with limited interaction with the public.” Id.
2 at 20. At step four, the ALJ determined that Lower’s past relevant work as a janitor was not
3 precluded by his RFC. Id. Finally, the ALJ found Lower was not under a disability because his
4 “medically determinable functional psychotic disorders, sleep apnea, and sleep-related breathing
5 disorders do not prevent him from performing his past relevant work.” Id.

6 **II. Magistrate Judge Benton’s Recommendation**

7 Magistrate Judge Benton recommends that the Court affirm the Commissioner’s decision.
8 Magistrate Judge Benton concluded that the ALJ’s credibility decision was not supported by
9 substantial evidence, but she found that Lower’s treatment record constituted substantial evidence in
10 support of the ALJ’s findings. Further, Magistrate Judge Benton found that the ALJ properly rejected
11 the lay testimony as to Lower’s limitations.

12 **III. Lower’s Objections**

13 Lower makes seven objections to Magistrate Judge Benton’s recommendation that the
14 Commissioner’s decision be affirmed. Lower’s objects as follows:

15 1. Although Magistrate Judge Benton found that the ALJ erred in his credibility determination,
16 she failed to address the impact of this error on the ALJ’s decision, and failed to rectify the error.

17 (Pl.’s Obj. at 2.)

18 2. Magistrate Judge Benton failed to address the fact that the ALJ’s RFC assessment did not
19 include any physical limitations resulting from Lower’s sleep apnea. (Pl.’s Obj. at 2 lines 6-9.)

20 3. Magistrate Judge Benton failed to address the issue of whether the ALJ erred as a matter of
21 law by failing to provide specific and legitimate reasons for disregarding Dr. Parlatore’s opinion
22 evidence, and instead provided her own rationale. (Pl.’s Obj. at 4.)

23 4. Magistrate Judge Benton failed to address the fact that the ALJ’s step 3 findings were
24 contrary to the State agency psychologist’s opinion. (Pl.’s Obj. at 8 lines 1-7.)

25 5. Lower objects to Magistrate Judge Benton’s conclusion that the ALJ properly rejected the
26 Nurse Practitioner’s opinions. (Pl.’s Obj. at 8 note 2.)

1 can be made, and (3) it is clear from the record that the ALJ would be required to find the
2 claimant disabled were such evidence credited.

3 Smolen v. Chater, 80 F.3d 1273, 1292 (9th Cir. 1996).

4 **II. Evaluating Disability**

5 The claimant bears the burden of proving that he is disabled within the meaning of the Act.
6 Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). The Act defines disability as the inability to
7 engage in any substantial gainful activity by reason of any medically determinable physical or mental
8 impairment which can be expected to result in death, or which has lasted or can be expected to last for
9 a continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A). A person is disabled
10 under the Act only if his impairments are of such severity that he is unable to do his previous work, and
11 cannot, considering his age, education, and work experience, engage in any other substantial gainful
12 activity existing in the national economy. 42 U.S.C. § 423(d)(2)(A).

13 The Commissioner has established a five step sequential evaluation process for determining
14 whether a claimant is disabled. See 20 C.F.R. §§ 404.1520(a-g). If the claimant is found to be
15 “disabled” or “not disabled” at any step there is no need to go on to the next step. Id. §
16 404.1520(a)(4). The claimant bears the burden of proof during steps one through four. Tackett v.
17 Apfel, 180 F.3d 1094, 1100 (9th Cir. 1999). At step five the burden shifts to the commissioner. Id.

18 At step one, the claimant must establish that he is not engaged in any substantial gainful
19 activity. 20 C.F.R. § 404.1520(a)(4)(i). If he is engaged in substantial gainful activity then he is not
20 disabled. Id. At step two, the claimant must establish that he has one or more medically severe
21 impairments or combinations of impairments. Id. § 404.1520(a)(4)(ii). If the claimant does not have a
22 severe impairment then he is not disabled. Id. At step three, the Commissioner will determine whether
23 the claimant’s impairment meets or equals any of the listed impairments described in the regulations.
24 Id. § 404.1520(a)(4)(iii). If the claimant’s impairments meet one of the listings for the required twelve-
25 month duration then he is disabled. Id.
26

1 If the claimant's impairments neither meet nor equal one of the impairments listed then the
2 Commissioner must evaluate the claimant's RFC based on all of the relevant medical and other
3 evidence in the record. Id. § 404.1520(a)(4)(iv). The Commissioner has interpreted RFC to mean the
4 following:

5 [The claimant's] maximum remaining ability to do sustained work activities in an ordinary
6 work setting on a regular and continuing basis[.] A "regular and continuing basis" means
7 8 hours a day, for 5 days a week, or an equivalent work schedule. RFC does not represent
8 the least an individual can do despite his or her limitations or restrictions, but the most.

9 Soc. Sec. Ruling ("SSR") 96-8p, at 2. The claimant's RFC is then used at step four to determine if he
10 can perform any past relevant work, and at step five to determine if he can adjust to other work. 20
11 C.F.R. § 404.1520(e). At step four, if the claimant is able to perform his past relevant work then he is
12 not disabled. Id. § 404.1520(a)(4)(iv). At step five, the Commissioner must show that he can perform
13 some other work that exists in significant number in the national economy, taking into consideration
14 the claimant's RFC, age, education, and work experience. Id. § 404.1520(g) If the Commissioner
15 finds the claimant is unable to perform other work, then the claimant is determined to be disabled. Id.

16 **III. Discussion of the Objections**

17 **A. Error Regarding Credibility Determination.**

18 The ALJ's finding that Lower's testimony regarding his limitations was "not totally credible" is
19 not supported by substantial evidence. "Once the claimant produces medical evidence of an underlying
20 impairment, the Commissioner may not discredit the claimant's testimony as to subjective symptoms
21 merely because they are unsupported by objective evidence." Lester v. Chater, 81 F.3d 821, 834 (9th
22 Cir. 1995)(internal citations omitted). "Unless there is affirmative evidence showing that the claimant
23 is malingering, the Commissioner's reasons for rejecting the claimant's testimony must be "clear and
24 convincing." Id. (internal citations and quotations omitted). "General findings are insufficient; rather,
25 the ALJ must identify what testimony is not credible and what evidence undermines the claimant's
26 complaints. Id. (internal citations omitted). Because the ALJ cited no evidence that Lower was

1 malingering, the ALJ was required to provide clear and convincing reasons to reject Lower's testimony
2 regarding his limitations.

3 Lower claims that his diagnosed disabilities prevent him from working. (AR at 55.) He
4 testified that his mental disabilities and inability to stay awake have caused him to leave or be fired from
5 his past relevant work. (AR at 454-456, 459-461.) He testified that at his longest sustained job he
6 was only able to work three days a week due to his sleep apnea. (AR at 455.) And more recently, he
7 fell asleep standing up as a greeter at Walmart. (AR at 456.)

8 The ALJ supported his credibility finding by noting that Lower has: (1) on many occasions in
9 the treatment notes denied any symptoms of depression or mania; (2) been encouraged to exercise; (3)
10 stated on numerous occasions that his medications are working and that they have no side effects; and
11 (4) been active in church, ministering to others, and so forth. (AR at 18-19.) Magistrate Judge Benton
12 concluded that the ALJ's basis for discrediting Lower was not supported by the record because
13 Lower's medically diagnosed severe sleep apnea was a "likely basis for daytime drowsiness and a
14 contributing cause for [Lower's] loss of work." (R & R at 7 p. 1.) The Court agrees with Magistrate
15 Judge Benton that the ALJ's credibility determination was not supported by the record. In addition to
16 the reasons cited by Magistrate Judge Benton, the court notes the following additional reasons why the
17 ALJ's credibility determination was not supported by the record.

18 1. Lower's Statements Regarding Symptoms and Effect of Medications

19 Although the ALJ does not site specific instances of denial, a review of the treatment notes
20 does substantiate his claim that Lower occasionally denied symptoms of depression or mania. See (AR
21 211, 213, 221, 230.) In addition, the treatment notes contain numerous statements from Lower
22 indicating that his medications are working and have little to no side effects. (AR at 225, 228, 235,
23 243, 249.) Lower made these statements with regard to his psychological disorders and medications.
24 Although this evidence could form the basis for a determination that Lower's testimony regarding his
25 mental limitations was not totally credible, it is not a "clear and convincing" reason to discredit
26 Lower's apnea related testimony. In fact, in some of the treatment notes cited, Lower follows up his

1 statements regarding his psychological treatment by noting that his sleep is still troubled. (AR at 213,
2 225.)

3 The ALJ was required to identify what testimony was not credible, and what evidence
4 undermines Lower's complaints. The ALJ's vague and general statements provide neither of these
5 requirements. Although the Court could speculate as to the ALJ's rationale, that line of inquiry is not
6 allowed when reviewing decisions under the Act. Pinto v. Massanari, 249 F.3d 840, 847 (9th Cir.
7 2001)(courts cannot affirm the decision of an agency on a ground that the agency did not invoke in
8 making its decision).

9 2. Lower's Daily Activities

10 The ALJ also bases his credibility finding on the fact that Lower had been encouraged to
11 exercise and was active in his church. (AR at 18-19.) The discrediting of testimony based on a
12 claimant's ability to carry on certain daily activities such as shopping, driving, or limited exercise has
13 been repeatedly rejected in this circuit. Orn v. Astrue, ___ F.3d ___, 12, 2007 WL 2034287 (9th Cir.
14 2007), citing Vertigan v. Halter, 260 F.3d 1044, 1050 (9th Cir. 2001). "[The Act] does not require
15 that claimants be utterly incapacitated to be eligible for benefits." Fair v. Bowen, 885 F.2d 597, 603
16 (9th Cir. 1989). Daily activities can form a ground for an adverse credibility determination only "if the
17 claimant is able to spend a substantial part of [his] day performing [activities] that are transferable to a
18 work setting." Smolen, 80 F.3d at 1284. The ALJ did not explain how any of the daily activities cited
19 could be transferred to a potential work setting. The fact that Lower was encouraged to exercise for
20 his overall health, and was active in his church, does not signify that he is capable of working on a
21 "regular and continuous basis." Thus, the ALJ's credibility find is not supported by substantial
22 evidence.

23 3. Legal Effect

24 When, as here, an ALJ improperly rejects a claimant's testimony, and the claimant would be
25 disabled if his testimony were credited, that testimony is credited as a matter of law. Lester, 81 F.3d at
26

1 834. Here, Lower's testimony that he could not work on a "regular and continuous" basis because of
2 his limitations must be credited as a matter of law.

3 **B. RFC Assessment.**

4 The ALJ erred by failing to include any physical limitations in his RFC assessment. As the ALJ
5 properly noted, in making the RFC assessment he must consider a claimants impairments and "any
6 related symptoms" based on the relevant medical and other evidence. 20 C.F.R. §§ 404.1545(a)(1) &
7 (3). (AR at 18.) However, after making this general statement, and then incorrectly discrediting
8 Lower's testimony, the ALJ found Lower to have the RFC for a "full range of work activity on a
9 physical basis" without any limitations due to sleep apnea. Magistrate Judge Benton concluded that
10 this assessment was based on substantial evidence because the treatment notes showed that Lower's
11 use of a Continuous Positive Airway Pressure ("CPAP") devise improved his physical conditions. (R
12 & R at 7.) Furthermore, she stated that this type of improvement demonstrates that Lower's sleep
13 apnea would not satisfy the twelve month duration requirement under the Act. (*Id.*) But this
14 reasoning is not present in the ALJ's decision, and cannot form the grounds for affirmation. *Pinto*, 849
15 F.3d at 847. The ALJ's RFC assessment contains no consideration of Lower's physical limitation due
16 to sleep apnea, and this failure constitutes legal error.

17 **C. Dr. Parlatore's Opinion Evidence.**

18 Dr. Parlatore remarked that Lower had severe limitations in his "[a]bility to respond
19 appropriately to and tolerate the pressures and expectations of a normal work setting[.]" (AR at 264.)
20 This diagnosis was acknowledged in the ALJ's decision once, and never referred to again. (AR at 17.)
21 The ALJ noted the other doctor's findings, all of which indicate a lower level of limitation than Dr.
22 Parlatore had expressed, but never described the weight afforded to each doctor. (AR at 17-19.) Nor
23 did he explicitly reject Dr. Parlatore's opinion, despite the fact his findings contradict Dr. Parlatore's
24 severe diagnosis.

25 The ALJ rejected Dr. Parlatore's opinion. Magistrate Judge Benton acknowledged that the
26 ALJ rejected the opinion of Dr. Parlatore, but concluded that the ALJ had a "salient" reason, and that

1 the decision was based on “substantial evidence.” (R & R at 7.) “[T]he opinion of an examining
2 doctor, even if contradicted by another doctor, can only be rejected for specific and legitimate reasons
3 that are supported by substantial evidence in the record.” Lester, 81 F.3d at 830-831 (citation
4 omitted). Furthermore, an ALJ errs when he fails to explicitly reject a doctor's opinion, or set forth
5 specific, legitimate reasons for crediting one doctor over another. Nguyen v. Chater, 100 F.3d 1462,
6 1465 (9th Cir. 1996).

7 Magistrate Judge Benton pointed out that several nurse practitioner's treatment notes showed
8 improvement over a twenty year period. This fact was noted by the ALJ, but was not used as a
9 rationale for rejecting Dr. Parlatore's opinion. (AR at 17-18.) Because Dr. Parlatore's opinion was not
10 explicitly rejected, nor specific and legitimate reasons given for the rejection, the ALJ's decision
11 constitutes legal error.

12 **D. The ALJ's Step 3 Findings were Contrary to the State Agency Psychologist's Opinion.**

13 Dr. Comrie gave his opinion as the State agency psychologist. (AR at 177-192.) “State
14 agency medical and psychological consultants are highly qualified physicians and psychologists who are
15 experts in the evaluation of the medical issues in disability claims under the Act.” SSR 96-6p, at 2.
16 Dr. Comrie found Lower to have moderate limitations in activities of daily living, maintaining social
17 functioning, and maintaining concentration, persistence or pace. (AR at 192.) The ALJ noted Dr.
18 Comrie's opinion, but found that Lower had only mild limitations in his activities of daily living. (AR
19 at 18-19.) A finding of mild limitation in this area was supported by Dr. Gregg (AR at 168), but the
20 ALJ gave no explanation for his rejection of Dr. Comrie's finding and his apparent support for Dr.
21 Gregg's. (AR at 18-19.) As explained above, this amounts to error.

22 **E. Nurse Practitioner's Opinions.**

23 Magistrate Judge Benton correctly concluded that the ALJ had properly rejected the lay
24 testimony of nurse practitioner's McCarthy and Werny. Her conclusion is supported by the evidence
25 and law. The ALJ need only give reasons germane to each witness to reject lay testimony. Stout v.
26 Comm'r of Soc. Sec. Admin., 454 F.3d 1050, 1053 (9th Cir. 2006). As explained by Magistrate Judge

1 Benton, the ALJ provided germane reasons as to the two nurse practitioner's. (AR at 17-18.) And the
2 nurse practitioner's are lay witnesses because they are not acceptable medical sources. 20 C.F.R. §§
3 404.1513(a), (d)(1).

4 **F. Dr. Sandvik.**

5 Magistrate Judge Benton correctly concluded that Dr. Sandvik offered no opinion on Lower's
6 functional assessment. Her conclusion is supported by the evidence and law. Dr. Sandvik assigned to
7 Lower a Global Assessment of Functioning score ("GAF") of 40 along with the comment that "[at]
8 times he is very paranoid with impairments in work, relationships, and judgment." (AR at 157.) This
9 GAF score alone does not amount to opinion on Lower's functional limitations. See 65 Fed. Reg.
10 50,746, 50,764-50,765 (August 12, 2000)(regulatory comment explaining that the GAF scale does not
11 have a direct correlation to the severity requirements of the mental disorder listings under the Act).
12 Lower's contention that the low GAF score, combined with Dr. Sandvik's comment, should have been
13 considered in the RFC assessment is without merit. Dr. Sandvik's language mirrors the Diagnostic and
14 Statistical Manual's ("DSM-IV") description of a 40 GAF score, and in this way can be seen as
15 providing his rationale as opposed to an additional comment. See American Psychiatric Ass'n,
16 Diagnostic & Statistical Manual of Mental Disorders 34 (4th T.R. ed. 2000).

17 **G. Lay Testimony of Mark Lower and Mark Crews.**

18 The ALJ's failure to address the testimony of Mark Lower and Mark Crews was error. "Lay
19 witness testimony as to a claimant's symptoms or how an impairment affects the ability to work is
20 competent evidence [that] cannot be disregarded without comment. Nguyen, 100 F.3d at 1467. Lay
21 testimony may be disregarded only if the ALJ gives "reasons that are germane to each witness." Stout,
22 454 F.3d at 1053. In Stout, the 9th Circuit conclusively joined "our sister circuits [who have]
23 consistently reversed the Commissioner's decisions for failure to comment on such competent
24 testimony." Id. at 1056.

25 Mark Lower and Mark Crews both submitted Third Party Functional Reports describing
26 Lower's difficulty with people, household chores, and grooming, along with his limitations at work due

1 to his sleep apnea and somnolence. (AR at 100, 109.) This testimony speaks directly to Lower's
2 ability to work and is supported by objective evidence (i.e. the diagnosis of severe sleep apnea). It
3 could not be ignored by the ALJ. The ALJ was required to give reasons germane to each witness if he
4 wished to discredit or disregard the testimony of Mark Lower and Mark Crews. Although Lower
5 raised this issue, Magistrate Judge Benton did not address this error in her Report and
6 Recommendation. The ALJ's silent disregard for this competent evidence was error.

7 **IV. Remand for Award of Benefits**

8 Because the ALJ's decision to discredit Lower's testimony is not supported by substantial
9 evidence, and because of the several legal errors in the ALJ's decision, the Court must either remand
10 for further proceedings or for an award of benefits. As discussed, the Court has discretion in this
11 decision, but may remand for award of benefits when the requisite elements are met. See McCartey,
12 298 F.3d at 1076-77. Those elements are met here: (1) the ALJ failed to provide legally sufficient
13 reasons for rejecting Lower's evidence; (2) no outstanding issues remain to be resolved before a
14 determination of disability can be made; and (3) the ALJ would be required to find Lower disabled if he
15 considered Lower's credited evidence. Under these circumstances, "the record has been fully
16 developed and further administrative proceedings would serve no useful purpose." Id.

17 **CONCLUSION**

18 The Commissioner's decision was not supported by substantial evidence, and was based on
19 legal error. Because the Commissioner would be required to find Lower disabled if the improperly
20 rejected evidence were credited, further administrative proceedings would serve no useful purpose.
21 The Court declines to adopt Magistrate Judge Benton's Report and Recommendation. The Court
22 REVERSES the Commissioner's final decision, and REMANDS for calculation of an award of
23 benefits.

24 DATED: September 21, 2007.

25 s/ Marsha J. Pechman
26 Marsha J. Pechman
United States District Judge